TITLE VII & MLB MINORITY HIRING: ALTERNATIVES TO LITIGATION

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> *"It has long been my conviction that we can learn far more about the conditions, and values, of a society by contemplating how it chooses to play, to use its free time, to take its leisure, than by examining how it goes about its work."*[1]
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> --A. Bartlett Giamatti, Former Major League Baseball Commissioner.

I. INTRODUCTION

In 1997, Major League Baseball (MLB) celebrated the fiftieth anniversary of Jackie Robinson breaking the modern day color barrier as the first African American player in the league's history. However, as all thirty MLB teams memorialized Robinson throughout their stadiums, critics challenged MLB to be honest about its progress in minority hiring.[2] In the fifty years following Robinson's milestone, only four minority managers and one minority general manager (GM) had been hired by MLB teams.[3] Since then, there has been minimal progress in minority hiring. At the commencement of the 2007 MLB season, two minority general managers (GMs) and five minority managers lead MLB teams.[4] Despite

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1. Kenneth L. Shropshire, *Minority Issues in Contemporary Sports*, 15 STAN. L. & POL'Y REV. 189, 208-09 (2004).

2. Ken Rosenthal, *From Outside, Frank Robinson Still Sees Plenty of Locked Doors*, BALT. SUN, Apr. 15, 1997, *available at* http://www.baltimoresun.com/sports/baseball/bal-frank0415,0,4846182.story?coll=bal-baseball-storyutil.

3. *See id.* (explaining how managers and GMs are typically considered the "brain trust" of a team.) Among his many responsibilities, the GM is responsible for negotiating player contracts, overseeing player development, and managing the team from a business standpoint. The manager is the day-to-day leader that devises team strategy and manages the players daily. *Id.*

4. Minority GMs include Omar Minaya (Mets) and Ken Williams (Chicago White Sox). Minority managers include Willie Randolph (Mets), Manny Acta (Washington

these incremental achievements, MLB acknowledges that further steps should be taken.[5] The goal of this comment is to dismiss Title VII litigation as a viable method of fighting discrimination in MLB hiring while suggesting initiatives that MLB could adopt to promote minority hiring.

Previous articles have addressed potential theories of discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII") that plaintiffs could assert against MLB or a MLB team.[6] This Comment argues that Title VII claims will likely fail and that to improve the hiring of minority managers and GMs in MLB, the Major League Baseball Players' Association (MLBPA) needs to negotiate provisions into the Collective Bargaining Agreement (CBA) that will allow for sustained consideration and hiring of minority candidates. This Comment defines minorities as Black, Latino, and Asian. Part II will illustrate the difficulties facing minority managers and GMs with the goal of establishing that racial discrimination may account for the lack of minority hiring in MLB. Part III will address the potential Title VII theories that a plaintiff might bring and explain the likely failure of each. Part IV will explain why the MLBPA is in the best position to challenge MLB concerning minority hiring. Part V will outline and discuss potential provisions that should be included in the CBA to facilitate minority hiring.

II. ESTABLISHING STATUS DISCRIMINATION

Willie Randolph became the first African American manager of a New York baseball team when he was named manager of the New York

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Nationals), Fredi Gonzalez (Florida Marlins), Ron Washington (Texas Rangers), and Ozzie Guillen (Chicago White Sox). *See* Murray Chass, *Managing Jobs: Recycling Seems Color Coded*, N.Y. TIMES, Nov. 19, 2006, *available at* http://query.nytimes.com/gst/fullpage.html?res=9405E7DC153EF93AA25752C1A9609C8B63 (stating that Acta, Gonzalez and Washington are minority managers); RICHARD LAPCHICK, THE 2006 RACIAL AND GENDER REPORT CARD: MAJOR LEAGUE BASEBALL 18 (2006), http://www.bus.ucf.edu/sport/public/downloads/2005_Racial_Gende Report_Card_Final.pdf (stating that Guillen is a minority manager); John Heyman, *Long Way To Go: Minority GM Candidates Still Not Getting a Fair Chance*, SI.COM, Apr. 16, 2007, http://sportsillustrated.cnn.com/2007/writers/jon_heyman/04/16/minorities.baseball/index.html (stating that Minaya and Williams are minority GMs and that Randolph is a minority manager that Minaya hired).

5. Tim Kurkjian, *Selig Concerned about Lack of Minority Managers*, ESPN THE MAGAZINE, Oct. 20, 2006, *available at* http://proxy.espn.go.com/mlb/columns/story?columnist=kurkjian_tim&id=2632210.

6. *See* Michael Corey Dawson, *A Change Must Come: All Racial Barriers Precluding Minority Representation in Managerial Positions on Professional Sports Teams Must be Eliminated*, 9 SETON HALL J. SPORT L. 551 (1999) (explaining the several theories available under Title VII for plaintiffs challenging the hiring practices of their employers).

Mets in 2004.[7] Coincidentally, Randolph was hired by Omar Minaya, the first Latino GM in MLB.[8] For both Randolph and Minaya, it was a long road before their paths eventually crossed in 2004.

Randolph was a six-time All-Star infielder during his eighteen year MLB career.[9] Throughout his career he was a solid lead-off hitter and a superb defensive player. After retiring in 1992, Randolph became a bench coach for the New York Yankees. During his eleven year tenure as a Yankees coach, Randolph gained a reputation for being a nice guy, but also as someone who "lacked sufficient smarts" and "filled the role of required token."[10] Despite this reputation, Randolph sought managerial positions with all interested MLB teams. He interviewed with ten MLB teams, including the New York Mets in 2002.[11] Each time, Randolph was turned down. It was not until 2004 that Randolph finally received his first managerial job.[12]

Minaya, a high school baseball star, made it to the minor leagues before joining the Texas Rangers as a scout in 1985.[13] As a scout, he signed many of baseball's best players, including perennial All-Stars Sammy Sosa and Juan Gonzalez.[14] In 1997, Minaya worked for the New York Mets where he became Assistant General Manager.[15] There he helped build a team that eventually went to the World Series in 2000. Despite Minaya's ascendancy from scout to mid-level executive, "Minaya was known throughout much of the game as a sound judge of talent lacking many of the necessities[16] required to guide a franchise."[17] Moreover, as he interviewed for GM positions, critics stated that Minaya lacked "administrative skills."[18] In spite of these characterizations, Minaya left the

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7. Lee Jenkins, *Mets and Randolph Embark on New Era*, N.Y. TIMES, Nov. 5, 2004, at D1.

8. Murray Chass, *Minaya, Robinson, Tavares Will Now Run the Expos*, N.Y. TIMES, Feb. 13, 2002, at D8.

9. The Baseball Cube, *Willie Randolph Statistics*, http://www.thebaseballcube.com/players/R/Willie-Randolph.shtml (last visited Sept. 15, 2007).

10. Jeff Pearlman, *The Real Deal on Omar and Willie*, ESPN.COM, Sept. 27, 2006, http://sports.espn.go.com/espn/print?id=2604573&type=story.

11. Lee Jenkins, *Mets Complete Randolph's New York Story*, N.Y. TIMES, Nov. 4, 2004, at D1.

12. Jenkins, *supra* note 7, at D3.

13. Chris Smith, *Los Mets*, N.Y. MAG., Mar. 7, 2005, http://nymag.com/nymetro/news/sports/features/11260/.

14. *Id.*

15. *Id.*

16. In 1987, Al Campanis interviewed with Ted Koppel and said that blacks do not have the necessities to manage a team. Shropshire, *supra* note 1, at 197. This reference to Campanis is meant to demonstrate that the required necessity is being white.

17. Pearlman, *supra* note 10.

18. Smith, *supra* note 13.

Mets in 2002 to become General Manager for the Montreal Expos,[19] an organization that MLB had voted to dissolve.[20] When the Expos' management dissented to the dissolution, MLB formed a partnership, bought the team, and still planned to dissolve the team.[21] However, legal problems prevented the execution of MLB's plan, and MLB agreed to wait until 2006 before it dissolved the team.[22] MLB offered Minaya, the first Latino GM in MLB history, a position to lead this soon-to-be dissolved MLB team.[23] Two years later, the Expos moved from Montreal to Washington, D.C. and Minaya rejoined the Mets as GM.[24]

As GM and Manager, Minaya and Randolph have had success with the New York Mets. Minaya, through trades and free agent signings, has assembled a talented and popular team that has drawn over six million fans to Mets home games in two seasons.[25] Randolph has taken that talent and turned the New York Mets from a team that only won seventy-one games in 2004, to a team that won ninety-seven games in 2006.[26] Despite their success, Minaya and Randolph still face harsh criticism. Minaya, who is from the Dominican Republic, has been branded a racist for acquiring too many Latino players, while Randolph has been criticized for being an inadequate on-field tactician who "lack[s] sufficient smarts."[27] While criticism of Randolph and Minaya may be the product of a hyperbolic New York media, it may also be that observers have had a difficult time believing that minority candidates could be qualified for these jobs.

The experiences of Minaya and Randolph are not unique. For example, Bob Watson, an African American, was assistant GM for the Houston Astros for five years.[28] During this period, MLB recruited many individuals for GM positions. Numerous teams overlooked Watson, however, claiming they did not know he was interested in a GM position.[29] After being ignored by several teams, he was finally promoted to GM by

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19. *Id.*

20. Jim Souhan, *Selig Still Plans on Contraction*, STAR TRIB. (Minneapolis, MN), Dec. 23, 2001, at C5.

21. *Id.*

22. *Id.*

23. Chass, *supra* note 8.

24. Lee Jenkins, *Troubled Mets Turn to Minaya*, N.Y. TIMES, Sept. 29, 2004, at D1.

25. Baseball Almanac, New York Mets Attendance Records, http://www.baseball-almanac.com/teams/metsattn.shtml (last visited Sept. 17, 2007).

26. ESPN, New York Mets Clubhouse, http://sports.espn.go.com/mlb/clubhouse?team=nym (last visited Sept. 17, 2007).

27. Pearlman, *supra* note 10.

28. *See* Reuters, *Watson Is Named Astros' G.M.*, N.Y. TIMES, Oct. 6, 1993, at B12 (announcing the promotion of Watson as Astros' GM after being an assistant GM from 1988 until 1993).

29. Claire Smith, *Minority-Group Hirings: A Poor Record Gets Worse*, N.Y. TIMES, Oct. 3, 1991, at B12.

the Houston Astros. At the time, he was only the second minority GM in MLB history.[30]

Once appointed, minority managers have been anything but ignored. For instance, Dusty Baker and Ozzie Guillen, former minority baseball players and current managers, have received threatening letters and e-mails containing racial epithets.[31] Being appointed to these positions is only one hurdle that minority managers must overcome.

Some commentators have attributed these difficulties to the "old boy network" hiring practices in MLB.[32] The "old boy network," an amorphous concept, describes a practice where team owners, mainly wealthy white men, select managers and GMs from within their own network. In many cases, this "network" translates into other white men, with whom the owners feel most comfortable. These hiring decisions may be due to the historical exclusion of minorities from sports, and therefore, their exclusion from the pool of applicants.[33] They may also be the product of conscious or unconscious racism on the part of MLB team decision-makers. Analyzing the actual impact of the "old boy network" requires a fact-intensive inquiry since its impact differs depending on the actors involved and the lack of clear-cut criteria explaining the calculus involved in the hiring process.

MLB has tried to combat the inherent problems of the "old boy network." In 1999, to increase minority hiring, MLB Commissioner Bud Selig[34] instituted a policy that required teams to consider minority candidates for top decision-making positions.[35] Under Selig's policy, prior to the hiring of a new manager, teams are required to submit a list of minority candidates to the Commissioner's office for review.[36]

At first, these efforts appear to contradict the merit based nature of sports. Ideally, sports are an arena where race disappears, talent and merit take primacy, and fanatics put aside their differences in the name of one

30. Reuters, *supra* note 28.

31. Howard Bloom, *Just How Far Has Major League Baseball Come (in Dealing with Racial Equality?)*, SPORTS BUSINESS NEWS, Aug. 29, 2006, http://www.sportsbusinessnews.com/_news/news_349727.php.

32. KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA 60 (1996).

33. In baseball, Jackie Robinson broke the color barrier in 1947. Robin Finn, *A Career Devoted to the Legacy of Jackie Robinson*, N.Y. TIMES, Nov. 17, 2006, at B4.

34. Bud Selig formerly owned the Milwaukee Brewers and took over as interim MLB Commissioner in 1992. In 1998 he took over the job full-time. Hal Bodley, *Selig's Reign Will be Remembered for the Good . . . the Ugly*, USA TODAY, July, 12, 2006, http://www.usatoday.com/sports/baseball/columnist/bodley/2006-07-12-bodley-allstar_x.htm.

35. *Probe: Were Minority-Hiring Guidelines Followed?*, ESPN.COM, May 13, 2003, http://espn.go.com/mlb/news/2003/0513/1552951.html.

36. *Id.*

goal: to win a championship. However, this view gives sports more credit than is due. Often, sports are not a place where we forget our differences, but rather where they are put on display. Sports can serve as a litmus test of our society and show us how much progress we have made (or have not made) with regard to racial diversity and the advancement of minorities. For example, before *Brown v. Board of Education* ("*Brown I*"),[37] Jackie Robinson broke the color barrier in MLB.[38] Robinson's experience as a major league player, which was replete with on- and off-field racial discrimination, showed Americans just how ready we were for integration. The reaction of public schools to *Brown I*, then, really came as no surprise.[39]

Although sports often reflect our flaws, they serve as the perfect backdrop to analyze racial discrimination. Sports are supposedly about meritocracies: how many home runs a hitter can score, how many strikeouts a pitcher can amass, and how many games a team wins. Managers, GMs, and owners all look at these numbers in assembling the best team they can. If sports, and MLB in particular, are true meritocracies, there should be more minority managers and GMs. In 2005, minorities composed approximately 40% of MLB rosters: Blacks 9%, Latinos 29% and Asians 3%.[40] More importantly, minority ballplayers have won an overwhelming portion of the Leagues' top accolades.[41] The best players in many cases are African American, Latino, and Asian American baseball players. It is incongruent, then, that there is a dearth of minority managers and GMs. Logic would deduce that minority managers and GMs would best know how to assemble staffs to identify talent, recruit minority players, manage minority-laden rosters, and teach a game that they have excelled at just as well, and in some cases, better than, their white counterparts. Moreover, increased minority hiring would make sense in a merit-based system. It would not be minority hiring for its own sake, and it would not create an expectation that teams have a percentage of minority managers and GMs that reflects the percentage of minority players merely

37. 347 U.S. 483 (1954) (holding that school segregation violated the Equal Protection Clause of the Fourteenth Amendment).

38. Finn, *supra* note 33.

39. For an example of public schools' retaliatory acts in response to the *Brown I* decision, see Liza Mundy, *Making Up for Lost Time*, WASH. POST, Nov. 5, 2006, at W22.

40. RICHARD LAPCHICK, THE 2005 RACIAL AND GENDER REPORT CARD 18 (2006), http://www.bus.ucf.edu/sport/public/downloads/2005_Racial_Gender_Report_Card_Final.pdf. These percentages of minority players has been fairly constant since 1991. *Id.*

41. There are six major awards given out in MLB each year: 2 MVP awards, 2 Cy Young Awards, and 2 Rookie of the Year Awards. In 2005, minority players won four of six major awards; in 2004 three of six, and in 2003, four of six. Major League Baseball, MLB Awards, http://mlb.mlb.com/mlb/awards/index.jsp (last visited Sept. 17, 2007) (follow "Most Valuable Player", "Cy Young award" and "Rookie of the Year" hyperlinks).

to say there is equality. Instead, minority hiring would reflect meritocracy at work: just as one would assume that the best lawyers would become partners at a law firm or that the best doctors would become chief surgeons, the best baseball players would become managers, GMs, and talent-evaluating executives.

However, this is not the case. During the 2005 season, there were only two minority GMs[42] and seven minority managers in MLB.[43] Willie Randolph and Omar Minaya exemplify that, despite stellar credentials, minority candidates must overcome perceptions that they are not qualified. Their stories beg the question, what then is at play? This is not a situation similar to college admissions where skeptics can identify statistics showing that some minorities have lower SAT scores or lower GPAs as reasons why minority candidates do not deserve the seats they are given.[44] Nor is it one where minority candidates received jobs despite scoring lower on required exams.[45] In terms of credentials, many minorities deserve managerial and GM positions because not only are they on par with their white counterparts, but in many instances, their qualifications are far superior.[46] If merit is not at issue, a strong case can be made that racial discrimination prevents minorities from ascending into decision-making positions. The characterizations of Randolph and Minaya strongly suggest that this is frequently the case.

III. APPLIED DISPARATE TREATMENT AND IMPACT THEORIES

The relationship between individual MLB teams, their managers and GMs is one of employment. Therefore, this relationship must comply with the relevant Title VII provisions. In relevant part, Title VII states that it is unlawful for public[47] and private employers to discriminate on the basis of race when making hiring decisions.[48] The Supreme Court has developed two theories that plaintiffs can use to state a claim of racial discrimination

42. LAPCHICK, *supra* note 40, at 23.

43. *Id.* at 20.

44. These skeptics have also brought their claims to court. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (bringing an equal protection claim where a law school applicant with a 3.8 GPA and 161 LSAT was rejected); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (bringing an equal protection claim where a medical school applicant with a benchmark score of 468 out of 500 was denied admission).

45. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (finding the test requirements that kept minorities confined to one department unconstitutional).

46. *See supra* text accompanying notes 9-17 (listing the credentials of Minaya and Randolph).

47. It has been argued that there could be a constitutional Equal Protection Clause argument because sports teams are state actors due to the public financing of sports arenas. SHROPSHIRE, *supra* note 32, at 73.

48. 42 U.S.C § 2000e-2 (2000).

under Title VII: the disparate treatment theory and the disparate impact theory.[49] The Court has developed two strains of the disparate treatment theory: individual disparate treatment and systemic disparate treatment.[50]

A. Individual Disparate Treatment

To prove disparate treatment, a plaintiff must prove through direct or circumstantial evidence that it was the plaintiff's status as a member of a protected group that motivated the employer's employment decision.[51] "Direct evidence of discriminatory motive may be any written or verbal policy or statement made by a respondent or respondent official that on its face demonstrates a bias against a protected group and is linked to the complained of adverse action."[52] For instance, in *Slack v. Havens*, the employer told workers who were unhappy over a job assignment change that "[c]olored people are hired to clean because they clean better," and "[c]olored people should stay in their place."[53] This type of direct evidence would be rare, however, given that modern-day racism tends to be more subtle.[54] As a result, a plaintiff will more likely have to make a disparate impact claim using circumstantial evidence.

To make a disparate treatment claim using circumstantial evidence, a plaintiff must comply with the test provided in *McDonnell Douglas Corp. v. Green*.[55] Under *McDonnell Douglas*,

> [T]he plaintiff has the initial burden of establishing a prima facie case of discrimination based on a prohibited category by showing (1) that the plaintiff belonged to a protected group; (2) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite the plaintiff's qualifications the plaintiff was rejected for the position; and (4) that after the rejection the position remained open and the

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49. Dawson, *supra* note 6, at 560.

50. *Id.*

51. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993)).

52. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY (July, 1992), *available at* http://www.eeoc.gov/policy/docs/disparat.html.

53. 522 F.2d 1091, 1092-93 (9th Cir. 1975).

54. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN L. REV. 317, 330, 355-356 (1987) (explaining the covert nature of modern-day racism and suggesting a new test for intent that looks at the "cultural meaning" of an allegedly racially discriminatory event for evidence of unconscious racism); *see also* Dawson, *supra* note 6, at 561 (citing *Slack v. Havens*, where company executives made discriminatory remarks about minorities).

55. 411 U.S. 792 (1973).

employer continued to seek applicants from persons of plaintiff's qualifications.[56]

When a plaintiff meets this burden, there is a rebuttable inference that discrimination has occurred. The defendant then has the burden of articulating a nondiscriminatory reason for rejecting the plaintiff.[57] The defendant does not have to demonstrate that the proffered reason is the *actual* reason for rejecting the plaintiff.[58] Once a nondiscriminatory reason is given, the burden shifts again to the plaintiff, who is given the opportunity to show that the employer's reason was a "pretext for the kind of discrimination prohibited by Title VII."[59] A plaintiff can show pretext in two manners: (1) the plaintiff can show through specific and affirmative evidence that the employer explicitly relied on plaintiff's status in a protected category[60] or (2) the plaintiff can present comparative evidence of similarly situated individuals to show that the employer's explanation is not plausible.[61]

A potential MLB managerial or GM plaintiff under Title VII will not be able to overcome the initial prima facie burden for several reasons. First, the MLB manager or GM candidate will have an extremely difficult time demonstrating individual discrimination unless an employer makes explicit comments.[62] Second, manager and GM jobs are not advertised positions. Therefore, it will be difficult to argue that the employer was seeking applicants, or that the candidates applied for the position.[63] This latter fact also defeats any potential success under the third or fourth elements of the *McDonnell Douglas* analysis. If the plaintiff did not apply for the job, he therefore cannot be rejected.[64] Even if manager and GM plaintiffs could somehow overcome this initial burden, they would probably have to make a pretextual argument comparing themselves to some other individual who is similarly situated. Courts, however, have interpreted this argument narrowly, and it would be easy for a MLB team to point out differences to show that two potential candidates are not similarly situated.[65]

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56. Gerrit B. Smith, *I Want to Speak Like a Native Speaker: The Case for Lowering the Plaintiff's Burden of Proof in Title VII Accent Discrimination Cases*, 66 OHIO ST. L.J. 231, 240 (2005).

57. *Id.*

58. Dawson, *supra* note 6, at 563.

59. Smith, *supra* note 56, at 240.

60. *Id.*

61. *Id.*; *see* Dawson, *supra* note 6, at 563-64.

62. Dawson, *supra* note 6, at 564.

63. SHROPSHIRE, *supra* note 32, at 65-66.

64. *See* Dawson, *supra* note 6, at 565 (explaining the informal hiring process for manager and GM positions in MLB).

65. *Id.*

B. Systemic Disparate Treatment

The analysis under a systemic disparate treatment theory is similar to that under the individual disparate treatment theory. A plaintiff can show systemic disparate treatment either through direct or circumstantial evidence. In this context, direct evidence constitutes a formal policy that the employer discriminates against an employee or applicant because of the employee's status in a protected category. Again, due to the prevalence of unconscious racism, a formal policy of discrimination is unlikely.[66]

In light of modern society's unconscious racism, it is more likely that a plaintiff will make a Title VII claim of systemic disparate treatment using circumstantial evidence. Under this theory, a plaintiff must point to policies or practices that discriminate against protected members. In *International Brotherhood of Teamsters v. United States*,[67] the Supreme Court stated that a valid systemic disparate treatment claim consisted of two elements: first, the policies or practices must have a disparate impact on minorities; and second, the disparate impact must be the result of an intent to discriminate.[68] A wide disparity between the treatment of minorities and unprotected groups allows for a presumption of discrimination.[69] In *Teamsters*, this impact was primarily illustrated through statistical evidence. A statistical analysis based on *Teamsters* first presupposes that labor markets do not discriminate against members of protected groups. Then, the statistical analysis compares the percentage of the particular racial group to the percentage of the racial group in the larger labor market.[70] The statistical evidence must illustrate a disparity sufficient to show that the treatment is the result of intentional discrimination rather than coincidence.[71] Continuous statistical disparity is important to this analysis. It is not sufficient to show a disparity in one given year. The *Teamsters* Court found the statistical evidence compelling because "statistical evidence is probative of intent to discriminate because actions suggest state of mind."[72]

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66. *See* Lawrence, *supra* note 54 (explaining the unconscious nature of racism).

67. 431 U.S. 324 (1977).

68. Dawson, *supra* note 6 at 556.

69. *Id.* at 340 n.20 ("Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination . . . .").

70. N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII implications of Race-Considered Roster Construction In Professional Sport*, 84 WASH. U. L. REV. 375, 402 (2006).

71. *See* Int'l Bhd. of Teamsters v. U.S., 431 U.S. 324, 341 n.20 (1977) (explaining how statistics may be used to indicate purposeful discrimination).

72. Dawson, *supra* note 6, at 567.

The systemic disparate treatment argument presents greater hope for a managerial or GM plaintiff than individual disparate treatment theory for two reasons. First, applying for the job is not part of the prima facie case, and second, there is no need to make a pre-textual argument.[73] Nonetheless, despite some suggestions that plaintiffs may have a successful claim under this theory,[74] plaintiffs would probably fail because managerial or GM minority plaintiffs cannot illustrate that there is a sufficient disparity between the percentage of minorities employed in these positions in baseball and the percentage of minorities employed in other major league sports.[75] A fifteen-year review of the statistics reveals this dilemma. In 1991, minorities composed 11% (3 managers) of all managers.[76] Five years later, in 1996, 14% (4 managers) of all MLB managers were minorities.[77] In 2001, 23% (7 managers) of MLB managers were minorities.[78] The most recent statistics reveal that during the 2005 season minorities represented 23% (7 managers) of all managers.[79] Furthermore, within the same timeframe, the percentage of minority GMs went from 4% (1 GM) in 1994 to 6% (2 GMs) in 2005.[80] Comparing these statistics to those of the National Football League (NFL) and National Basketball League (NBA) reveals similar percentages (this is especially true when compared to the NFL).

The percentages of minority head coaches[81] in the NFL are similar to the percentages of minority GMs in MLB. In 1990, the percentage of minority head coaches was 4% (1 head coach).[82] The percentage improved to 13% (4 head coaches) in 1995[83] and in 2000 it dipped to 10% (3 head coaches).[84] In 2005, 19% (6 head coaches) of all NFL head coaches were minorities.[85] Minorities were also left out of GM positions. In 1993, 14% (4 GMs) of NFL GMs were minorities and in 2001 6% (2 GMs) of GMs

73. *See* discussion *supra* Part III.A (discussing the difficulties of pre-textual arguments).

74. *Id.*

75. There may be some question as to the appropriate comparative market. There are various possibilities. In a suit against MLB, the comparative labor market might be other major league sports. In a suit against a MLB team the comparative labor market might be other MLB teams. Each party to the action will obviously choose a labor market that best represents its interests.

76. LAPCHICK, *supra* note 40, at 20.

77. *Id.*

78. *Id.*

79. *Id.* The percentages have improved, but the total numbers are virtually identical through this fifteen year period.

80. *Id.* at 23.

81. A head coach in the NFL is the closest equivalent to a manager in baseball.

82. LAPCHICK, *supra* note 40, at 49.

83. *Id.*

84. *Id.*

85. *Id.*

were minorities.[86] The most recent data, collected in 2005, showed that 13% (4 GMs) of GMs in the NFL were minorities.[87] Because the NFL statistics are virtually identical to the MLB hiring statistics, MLB minority plaintiffs cannot make a strong case that they are not getting manager and GM positions at the same rates as minorities in the NFL. Both leagues hired approximately the same percentage of minority managers/head coaches and in some years MLB outperformed the NFL. From a legal perspective, there is no strong statistical argument for disparity, let alone any continued pattern that might provide evidence of a discriminating state of mind. The NBA presents a slightly different picture.

The NBA has a better record of minority hiring than both MLB and the NFL. During the 1991-92 season, minorities comprised 7% (2 head coaches) of NBA head coaches.[88] This improved to 24% (7 head coaches) during the 1996-97 season,[89] and again during the 2001-02 season when minorities held 48% (14 head coaches) of NBA head coaching positions.[90] Most recently, during the 2005-06 season, 37% (11 head coaches) of NBA head coaches were minorities.[91] The NBA also surpasses MLB and the NFL in the percentage of minorities hired into GM positions. During the 1994-95 season, 31% (9 GMs) of GMs were minorities.[92] This percentage has stayed mostly consistent. During the 2005-06 season 23% (7 GMs) of NBA GMs were minorities.[93] These statistics illustrate a wider disparity when compared to MLB, but this statistical disparity alone may not be sufficient. When the NFL's statistics are considered, the disparity is reduced.

In this context, the *Teamsters* scheme fails to provide MLB minority plaintiffs with a successful remedy.[94] The *Teamsters* analysis fails here, and in many other situations, because of the underlying premise that other labor markets do not discriminate against protected groups. Given the prevalence of unconscious racism, this premise may be misguided. Nonetheless, a minority plaintiff stands to lose at trial given the current legal scheme.

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86. *Id.* at 52.
87. *Id.*
88. *Id.* at 31.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 34.
93. *Id.*
94. *But see* Duru, *supra* note 70, at 402-04 (explaining a scenario where a *Teamsters* analysis could provide a remedy to an NBA player).

C. *Disparate Impact*

The Supreme Court first articulated the disparate impact test in *Griggs v. Duke Power Company*.[95] In that case, the defendant implemented a policy that required applicants to have a high school diploma and to pass standardized tests in order to receive admission into the particular departments within the company.[96] As a result, black employees were concentrated in the labor department. The Court held this policy impermissible. As Chief Justice Burger noted, "The objective of Congress in the enactment of Title VII . . . was to achieve equality in employment opportunities. . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."[97] The Court found, based on statistical evidence, that the facially neutral policy overwhelmingly disadvantaged black employees in practice and therefore violated Title VII.

The disparate impact theory was eventually codified in the Civil Rights Act of 1991,[98] which amended Title VII.[99] A successful disparate impact claim consists of up to three stages. First, the plaintiff must make a prima facie showing of a facially neutral policy that adversely affects

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95. 401 U.S. 424 (1971).

96. *Id.* at 427-28.

97. *Id.* at 429, 431.

98. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified in sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C. (2000)). 42 U.S.C. § 2000e-2(k) allocates the burden of proof in disparate impact cases as follows:

> (1)(A) An unlawful employment practice based on disparate impact is established under this title only if--
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.
>
> . . . .
>
> (C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice."

99. Previously, the Court had held that statistical disparity between whites and non-whites was not enough to establish a disparate impact claim. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-55 (1989) (ruling that a comparison between the percentage of cannery workers who are white and the percentage of non-cannery workers who are non-white does not make out a prima facie case of disparate impact). This decision eventually led to the 1991 amendment of the Civil Rights Act.

minorities.[100] More specifically, the plaintiff must "demonstrate that *each* particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decision-making process are not capable of separation for analysis, [then] the decision-making process may be analyzed as one employment practice."[101] Statistical evidence is sufficient to illustrate that the policy adversely affects minorities.[102] In response, the employer must show that the practice or policy is job-related and is a business necessity.[103] If the employer meets this burden, the plaintiff can point to alternative nondiscriminatory business practices that the employer could utilize. If the employer refuses to implement these practices, discrimination is established.[104]

The disparate impact theory holds more promise for MLB minority plaintiffs because it allows plaintiffs to make the initial prima facie showing of discrimination by utilizing a wider range of statistical comparisons. Nevertheless, the theory probably will not provide a sufficient judicial remedy for three reasons: (1) the vague hiring practices and policies of MLB teams, (2) the implementation of Bud Selig's minority hiring policy, and (3) the failure to show that potential plaintiffs proposed an "alternative employment practice" that MLB rejected.

Under the disparate impact theory, a minority plaintiff is freed from statistical comparisons to other *minorities* in different labor markets. In *Griggs*, for example, the plaintiff showed discrimination by comparing black test takers to their white counterparts.[105] Similarly, MLB minority plaintiffs will be able to point to statistics comparing the rates of minority and white managers and GMs in MLB. The fact that 86% of MLB managers were white and 11% were black in 1996 becomes legally relevant.[106] Furthermore, the disparate impact theory creates an opportunity to compare the disparity between the percentage of minority players and the opportunities afforded to minorities for manager and GM positions. Minority plaintiffs could point to these disparities as evidence that the hiring practices of managers and GMs have a disparate impact and are therefore discriminatory. For instance, a statistic that in 2005 40% of

100. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

101. *Id.* § 2000e-2(k)(1)(B)(i) (emphasis added).

102. *Wards Cove*, 490 U.S. at 650 (articulating that statistical comparison must be between racial composition in at-issue jobs and racial composition in the relevant job market).

103. 42 U.S.C. § 2000e-2(k)(1)(B)(ii) (2000).

104. *Id.* § 2000e-2(k)(1)(A)(ii).

105. Griggs v. Duke Power Co., 401 U.S. 424, 427-28 (1971).

106. LAPCHICK, *supra* note 40, at 20.

players (474) were minorities but only 23% of managers (7) were minorities could serve as evidence of discrimination.[107]

The importance of these statistics, however, will be mitigated given the vagueness of MLB teams' hiring policies. Minority plaintiffs will most likely point to the "old boy network" as the discriminatory hiring practice. However, they will have difficulty identifying each hiring practice that comprises the "old boy network," if such a practice could even be compartmentalized.[108] A National Association for the Advancement of Colored People (NAACP) study revealed that MLB teams, like most other professional teams, do not have specifically identifiable hiring practices.[109] Instead, team decisions tend to be subjective, with hiring criteria being weighed differently according to the particular decision-maker.[110]

Since the minority plaintiff cannot identify each element of the "old boy network" Title VII requires that he or she analyze the "old boy network" as one employment practice. However, this analysis will only be successful, if the plaintiff can identify the elements of the "old boy network" and demonstrate to the court that, to make a Title VII analysis, the elements cannot be separated. Again, identifying the elements of such an amorphous and flexible concept as the "old boy network" will prove difficult. If minority plaintiffs are unable to establish these elements, the exception will not apply and their claim will be unsuccessful.

Even if minority plaintiffs are able to establish the specific practices of the "old boy network," MLB's policy of requiring teams to interview minority candidates[111] may effectively rebut a claim of discrimination. This policy is the only transparent employment practice that both minority plaintiffs and defendant teams can affirmatively claim that exists. Defendant teams will point to this policy as evidence that they recognize the importance of recruiting and hiring minority candidates and therefore interview minorities each time a position is available. Defendants will argue that the lack of minority hires is not the result of a facially neutral, yet discriminatory practice, but instead is the result of several other factors.[112] If the court accepts this argument, defendant teams will have met their burden under the *Griggs* analysis.[113] Skeptics and plaintiffs will

107. *See id.* at 18, 20 (providing charts that show, respectively, the percentage of minority players and the percentage of minority managers in MLB).

108. SHROPSHIRE, *supra* note 32, at 65.

109. *Id.*

110. *Id.*

111. *Probe: Were Minority-Hiring Guidelines Followed?*, *supra* note 35.

112. Willie Randolph's experience illustrates this point. Defendant teams will likely point to lack of desire and inexperience as the decisive factors.

113. 42 U.S.C. § 2000e-2(K)(1)(B)(ii) (2000) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.").

assert that interviewing minorities and hiring them are two separate acts and that minorities are not hired because of the discriminatory practices of the "old boy network." This argument is compelling, but as articulated previously, it must be substantiated with specific elements if it is to meet the Title VII requirements.

Substantiating the elements of the "old boy network" is the key to establishing discrimination under Title VII. If minority plaintiffs are able to convince the court that the "old boy network" is discriminatory, defendant teams will have a difficult time contending that the practice is a business necessity. There is no identifiable business necessity that justifies MLB's refusal to consider minority players for manager or GM positions over the course of sixty years. Moreover, if defendant teams argued that their fan base would not support a team managed by whites more readily than blacks, they would have a difficult time convincing a court this is a business necessity.[114] Assuming, *arguendo*, that defendants can establish a judicially acceptable business necessity, minority plaintiffs are still required to proffer an "alternative business practice" that defendant teams refuse to implement.[115] This requirement would not only force minority plaintiffs to make sure that they have completed this step before bringing suit, but also force them to proffer an "alternative business practice" that is more favorable than the practice of requiring teams to consider minority candidates for manager and GM positions.

D. Conclusion

A MLB minority plaintiff that intends to bring a Title VII suit against MLB or a MLB team is unlikely to receive a judicial remedy under the different theories of discrimination. Each theory of discrimination presents obstacles the minority plaintiff probably cannot overcome. In the individual disparate treatment theory, the plaintiff cannot show that he applied for a manager or GM position and was rejected on the ground of race. Further, a court will not find a comparison to similarly situated individuals legally significant. Under the systemic disparate treatment theory, the plaintiff will only be permitted to compare the percentage of minorities in MLB's manager and GM positions with the percentage of minorities in the related labor markets. The available statistics do not substantiate discrimination under this theory. Thus, a minority plaintiff's

114. *See* Duru, *supra* note 70, at 405 (explaining in individual disparate treatment analysis that the recruitment of white basketball players in order to please the predominantly white population in Utah would not a permissible bona fide occupational qualification defense). No defendant in disparate impact case has stated that customer discrimination is valid business necessity.

115. 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

best opportunity to make a Title VII argument is under the disparate impact theory. However, the vague nature of the "old boy network" will probably provide an insurmountable evidentiary hurdle. Given a minority plaintiff's small chance for success, the Major League Baseball Players' Association (MLBPA) offers the best opportunity for increasing the number of minorities in manager and GM positions.

IV. CURT FLOOD, COGNITIVE BIAS & BASEBALL SENTIMENTALITY

MLBPA is in the best position to change minority hiring practices because it can avoid, or at the very least, mitigate three obstacles confronting a minority plaintiff attempting to bring a Title VII claim. The three main obstacles facing a minority plaintiff include (1) the "Curt Flood Dilemma,"[116] (2) the cognitive bias of many judges in racial discrimination cases, and (3) the strong sentimentality of many judges toward baseball. Through collective bargaining negotiation, MLBPA could avoid all three obstacles. The following sections will discuss each of these problems in-depth, explaining why MLBPA could avoid these problems and why it could best advocate for improvements in minority hiring.

A. The Curt Flood Dilemma

The Curt Flood Dilemma encompasses many problems. In order to conceptualize the Curt Flood Dilemma it is necessary to understand Curt Flood's story.

Curt Flood was an All-Star center-fielder for the Saint Louis Cardinals. He was traded to the Philadelphia Phillies in 1969.[117] At the time of his trade, MLB teams operated under an agreement that included a provision called "the reserve clause."[118] This provision allowed each team to "reserve" forty players on their roster and preclude other teams from signing the "reserved" players to contracts.[119] This provision was memorialized in Paragraph 10(a) of the Uniform Player Contract, which stated, in relevant part, "[T]he Club shall have the right . . . to renew this contract for a period of one year."[120] This provision meant that "[a] team could automatically renew a player's contract for another season at as little as 80 percent of the previous season's salary."[121] The reserve clause

116. This is a phrase that I have adopted.

117. BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS 1 (2006).

118. *Id.* at 2.

119. *Id.*

120. *Id.*

121. *Id.*

essentially kept MLB players shackled to their original teams, unless their teams traded them to another team. A trade, though, just meant that their contract had been assigned to another team and that the new team now had the rights to that player for the duration of his MLB career. It was this system that Flood challenged when he refused to comply with the trade and report to the Philadelphia Phillies.[122]

The ensuing litigation and collateral damage—the financial struggle, professional isolation, and personal sacrifice—to Flood is what I term the Curt Flood Dilemma. A player deciding to bring a suit against baseball is faced with many of the same obstacles that Flood decided to confront. First, Flood, who was thirty-one years old[123] at the time, put his whole career at risk. At the time of his suit, he was one of the highest paid MLB players and gave up his salary to fight for the rights of MLB players to play for the team of their choice.[124] Second, Flood faced the problem of financing and staffing his suit. Unable to amass the financial and legal wealth needed to present a formidable challenge, Flood turned to the MLBPA. The MLBPA was able to pay Flood's legal fees and provided him with the best legal talent.[125] In the meantime, Flood struggled to make ends meet.[126] Third, in addition to financial sacrifice, Flood was ostracized from MLB and found few public supporters. Even future Hall of Fame black baseball players refused to support Flood in his attempt to improve the opportunities for all MLB players.[127] Flood's best friend on the Saint Louis Cardinals, Bob Gibson, even told Flood that while "he supported him, he planned on standing 'a few hundred paces' behind him to avoid any fallout."[128] Gibson, though, did come to Flood's defense and asserted that "[g]uys who come out against it (Flood's suit) see themselves as having futures in baseball management."[129]

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122. Flood eventually lost his suit. *Id.* at 306-07. The reserve clause, however, was subsequently eliminated. *Id.* at 314 (explaining the 10-and-5 rule negotiated in the 1973 Basic Agreement that allowed any player with ten years of service and five years with the same team to be traded without his consent).

123. *Id.* at 2.

124. *Id.* at 19 ("At $90,000, his salary was one of the 10 to 15 highest in the game.").

125. Flood's legal team included former Supreme Court Justice Arthur Goldberg, who at the time was a partner at the law firm of Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison. *Id.* at 82-92.

126. *See id.* at 254 ("Flood desperately needed money. . . . A few weeks before the Court granted cert in his case, Flood wrote Miller asking for an early severance payment of $10,000.").

127. *See id.* at 120 (discussing how Ernie Banks, Willie Mays, Henry "Hank" Aaron, Billy Williams, and Frank Robinson were black baseball players that refused to publicly support Flood). *But see id.* at 120-22 (stating there were players that supported Flood, including Jackie Robinson, Vada Pinson, Jim Grant, Sandy Koufax, and Dick Allen).

128. *Id.* at 121.

129. *Id. But see id.* at 120 (discussing how Jackie Robinson in particular attacked Frank Robinson for not taking a stand: "Jackie Robinson believed, [Frank Robinson] was too

The Curt Flood Dilemma still exists in 2007 and is even more pronounced. The salary of a minority candidate attempting to work his way toward a managerial or GM position will still be substantial. For a bench coach like Willie Randolph, forgoing that salary will be a difficult choice. In addition, only players qualify as union workers under the MLBPA.[130] As such, a minority plaintiff probably would not receive financial support from the MLBPA. The decision to fight MLB in court alone, then, becomes even more daunting. Lastly, it is unlikely that a minority plaintiff would receive public support. If players were resistant to challenging the status quo of the reserve clause, it is even less likely that MLB players and coaches would be willing to publicly speak about racially discriminatory practices in MLB. MLB players, who stand to make millions of dollars in the game, certainly would not risk their careers by speaking out against their team. Furthermore, those that covet management positions, just as Gibson pointed out, are not going to jeopardize their careers and risk being labeled as someone that plays "the race card."[131]

B. Cognitive Bias

While the Curt Flood Dilemma focuses primarily on reasons why a minority plaintiff might not step forward to bring suit, the evidentiary structures of Title VII permit judges' cognitive biases to hinder the possibility that a Title VII minority plaintiff will succeed at trial.

Title VII anti-discrimination law is only concerned with "whether a protected status category . . . has necessarily or determinatively influenced the challenged outcome or decision."[132] It is *not* attempting to "explain the entire universe of factors that could account for a particular decision or occurrence."[133] In essence, Title VII causal analysis *only* seeks to evaluate the role of a plaintiff's protected status in a hiring decision.[134]

To evaluate the role of a plaintiff's protected status, the three theories of Title VII explained above essentially follow a three-step process. The plaintiff introduces status as an explanation for an adverse outcome, the

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fixated on becoming baseball's first black manager to speak out on racial and social issues.").

130. MLBPA, AGREEMENT BETWEEN MAJOR LEAGUE CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, 2007-2011 BASIC AGREEMENT (2007), http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

131. *See generally id.* at 209-11 (explaining the negative backlash that Flood received after he published a book, *The Way It Is*, where he detailed the racism of the fans, managers, and owners that was pervasive at every level of the game).

132. Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1517 (2005).

133. *Id.*

134. *Id.*

defendant posits a status-neutral explanation, and then the fact-finder must decide and evaluate the causal link for the outcome.[135] Typically, the prima facie case and rebuttal rely on contrastive reasoning where each party is allowed to contrast the plaintiff with another individual or group to explain whether status played a role. For instance, in the individual disparate treatment context, once a defendant is able to posit a status-neutral explanation, the plaintiff can compare himself to a similarly-situated individual. In the systemic disparate context, a plaintiff must demonstrate that status influenced the outcome through comparison to others in a similar labor market.

The problem with this evidentiary structure is that it relies on contrastive reasoning, which "tends to focus on finding any *sufficient* factor or characteristic that might explain disparate . . . outcomes . . . ."[136] This is problematic because it improperly shifts the focus of Title VII liability. Title VII is only concerned with evaluating the role of status in the decision-making process and contrastive reasoning elicits factors sufficient to explain the outcome.[137] It is possible that multiple factors produced the outcome. Contrastive reasoning does not isolate and then evaluate the role of status. As a result, as long as there is a sufficient factor to explain the employment decision, the court never analyzes the role of status.[138]

Contrastive reasoning is also vulnerable to cognitive stereotypes.[139] After a plaintiff puts forth a prima facie case establishing that status illegally determined the outcome and "the defendant has produced an explanation . . . the fact-finder's causal compass depends heavily on his or her own knowledge and assumptions about discrimination and the status group at issue."[140] This is particularly troublesome because when "explaining differential outcomes or decisions involving statuses such as race . . . there is a tendency, either at the subconscious level or through conscious manipulation, to rely on well-entrenched or learned biases and stereotypes about the interests, capabilities, and attributes of different social groups."[141] For example, at trial, the fact-finder is asked to overcome his or her own cognitive biases and be perceptive enough to probe the unconscious stereotypes of others.[142] In contexts outside of sports, the courts have not been able to perform this task and it would be imprudent

135. *Id.* at 1474.
136. *Id.* at 1517.
137. *Id.*
138. *See id.* at 1520 (explaining the problems and limitations of contrastive reasoning).
139. *Id.* at 1518.
140. *Id.* at 1522.
141. *Id.* at 1526.
142. *See generally id.* at 1527 (explaining how "lack of interest" explanations often have nothing to do with the lack of women applicants, but rather with stereotypes about the proper roles for women in the workplace).

for a minority plaintiff bringing suit to believe it would be different in their circumstances.[143] Although not stated by judges, the comments made about Minaya and Randolph in Part II reflect our society's entrenched stereotypes concerning the abilities of minorities in leadership positions and should give pause to a minority plaintiff attempting to overcome the cognitive bias of the courts.

C. *Baseball: It Is Not A Game, But A Passion*

The courts and Congress seemingly hold baseball in high esteem. In part, it may be the nostalgia of baseball as "America's pastime" that allows judges and lawyers, many of whom grew up during the pinnacle of baseball's popularity, to see baseball through rose-colored glasses. Curt Flood certainly faced this in his suit, *Flood v. Kuhn*.[144] From the beginning, Flood encountered judges whose boyish love for baseball was apparent in their legal decisions. For instance, in deciding a preliminary injunction, Judge Cooper of the Southern District of New York "made no secret of his love of the game," in a surprising fifty-five page decision.[145] At trial, Cooper fawned over baseball star, Jackie Robinson.[146] Additionally, when the case finally reached the United States Supreme Court, Justice Harry Blackmun, charged with writing the majority opinion, devoted the first section to "expound[] on baseball's history . . . mentioning the first recognized game in 1846 at Hoboken's Elysian Fields, the founding of the Cincinnati Red Stockings in 1869 . . . the 1919 World Series fix . . . [and] the institution of the new player draft in 1965."[147] Moreover, Justice Blackmun, in a personal ode to baseball, compiled seventy-nine names of former baseball players[148] and even cited the popular poem *He Never Heard of Casey* by sportswriter Grantland Rice.[149]

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143. *See id.* at 1526-27, 1529 (explaining how stereotypes affected *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653-54 (1989), how district courts were biased against women applying for traditionally male dominated jobs, and how cognitive bias affected the preemptory striking of minority jurors).

144. 407 U.S. 258 (1972).

145. SNYDER, *supra* note 117, at 132 ("Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one . . . [T]he game is on higher ground; it behooves everyone to keep it there.").

146. *Id.* at 161.

147. *Id.* at 294; Flood v. Kuhn, 407 U.S. 258, 261-62 (1972).

148. *Kuhn*, 407 U.S. at 262-63.

149. *Id.* at 263 n.4.

Judge Cooper's and Justice Blackmun's demonstrated sentimentality toward baseball is still prevalent today. This is best evidenced in baseball's current steroids debate. The statements of several Congressmen during the House Reform Committee hearing[150] on steroids and baseball provide the best examples. For instance, Chairman Tom Davis of Virginia stated that "there is a cloud over the game that I love."[151] Congressman Jose Serrano of New York stated that, "For me, baseball is not a game. It is a passion . . . . When Mr. McGwire and Mr. Sosa took us on that ride that summer, that wasn't just hitting homeruns, that was a country hanging on to heroes."[152] Congressmen Davis and Serrano are not outliers and their statements mirror the sentiments of many.[153] Their emotional and sentimental comments demonstrate the influence nostalgia can have over judicial decisions. After all, judges are merely men, and like the men before them, they will seek to protect the image of the game they love.

Even when grouped with unfavorable Title VII theories, external burdens on minority plaintiffs, and the allowance for cognitive bias in discriminatory adjudication, baseball's position of high regard still remains relevant.

D. MLBPA

MLBPA is in the best position to improve minority hiring because it can avoid many of these obstacles due to its bargaining strength. Moreover, MLBPA has a vested interest in promoting minority hiring because it provides its players with improved opportunities.

If MLBPA leads efforts to improve minority hiring at the managerial and GM positions, the obstacles discussed above will likely disappear. MLBPA is a strong labor union[154] that could negotiate terms into the CBA

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150. The hearings were entitled, *Restoring Faith In America's Pastime. See infra* note 153.

151. Ted Barrett, *McGwire Mum on Steroids in Hearing*, CNN.COM, Mar. 17, 2005, http://www.cnn.com/2005/ALLPOLITICS/03/17/steroids.baseball.

152. Press Release, Congressman Jose Serrano, Congressman Serrano's Comments at March 17th Baseball Hearing (Mar. 21, 2005), http://www.house.gov/list/press/ny16_serrano/050317Baseball.html

153. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 385 (2005) (statement of Rep. Wm. Lacy Clay, Member, H. Comm. on Gov't Reform) ("As a young man . . . I grew up with baseball in my blood."); *id.* at 386 (statement of Rep. John Porter, Member, H. Comm. on Gov't Reform) ("I certainly took part in pick-up baseball games whenever I could, dreaming to someday be like one of the 'greats' . . . ."); *id.* at 55 (statement of Sen. Jim Bunning) ("As a member of the Baseball Hall of Fame . . . protecting the integrity of our national pastime is a matter that is near and dear to my heart.").

154. *See* Chris Isidore, *Progress Seen in Baseball Labor Talks*, CNN.COM, Sept. 22, 2006, http://money.cnn.com/2006/09/22/commentary/sportsbiz/index.htm ("The Major

to achieve increased minorities in GM and managerial positions. The strength of MLBPA is seen in the advantageous arrangements that MLB players are afforded. Presently, MLBPA is the only sports union that has avoided implementation of a salary cap.[155] MLBPA players are paid almost three times their 1994 salaries and the minimum salary in 2006 approximately represented the median salary in 1994.[156] Additionally, when Congress investigated and attempted to impose stricter penalties on steroid use in MLB, MLBPA peremptorily negotiated an agreement with MLB owners to implement more stringent penalties for steroid use.[157] Simultaneously, and skillfully, MLBPA added a provision that allowed MLBPA to unilaterally return to the less stringent policy if a new CBA was not agreed upon when the old CBA expired.[158] The MLB owners, under much congressional pressure, came to an agreement with the MLBPA before the contract expired.[159]

Given the bargaining strength of MLBPA, plaintiffs challenging MLB's hiring practices would not be required to resort to litigation to remedy minority hiring. As such, MLBPA would not be required to find a plaintiff willing to risk his career and face the hostilities experienced by Curt Flood.[160] Additionally, MLBPA would not have to overcome the cognitive biases and baseball "sentimentality" prevalent in the courts.

League Baseball Players Association has long been the most united union in sports, if not in the country as a whole . . . .").

155. *See* Associated Press, *A-Rod Deal Changes Red Sox Owner's Stance on Salary Cap*, SPORTSLINE.COM, Feb. 18, 2004, http://cbs.sportsline.com/mlb/story/7097874 (arguing that if baseball owners attempt to get a salary cap, it will probably trigger baseball's first work stoppage in over a decade); Salary cap for 2006-07 season set at $53.135M, http://sports.espn.go.com/nba/news/story?id=2516704 (illustrating that NBA has a salary cap); Salary cap status of all 32 teams, http://sports.espn.go.com/nfl/news/story?id=2349505 (showing that NFL has a salary cap).

156. Isidore, *supra* note 154 (explaining that the average salary in 2006 ($2.9 million) was almost triple that in 1994 and the minimum salary in 2006 ($327,000) approximately represents the median salary in 1994).

157. Associated Press, *Without New Labor Deal, MLBPA Can Scrap Drug Policy*, ESPN.COM, May 9, 2006, http://sports.espn.go.com/mlb/news/story?id=2439331.

158. *Id.*

159. Barry M. Bloom, *MLB, Union Announce New Labor Deal*, MLB.COM, Oct. 25, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20061024&content_id=1722211&vkey=ps2006news&fext=.jsp&c_id=mlb.

160. SNYDER, *supra* note 117, at 351 ("Flood paid a terrible price for taking on the establishment and served as a cautionary tale for the modern professional athletes whom he helped enrich. . . . Yet they [modern professional athletes] depend so much on corporate America that political or social activism would be career suicide. . . . As [Michael] Jordan reportedly told a friend who asked him to campaign in his home state of North Carolina against Republican senator Jesse Helms, 'Republicans buy shoes, too.'").

MLBPA also has an interest in promoting diversity; an interest that will only increase as MLB continues its efforts to internationalize.[161] MLBPA represents the majority of the future population of managers and GMs. As a result, it is the current population of players that will benefit from increased opportunities after retirement. The impetus for players to support improved opportunities for minorities will give the proposal strength and avoid the professional blacklisting that Curt Flood suffered.

A corollary to MLBPA's interest in improving opportunities for minority management is that MLB owners would benefit more from negotiating with MLBPA concerning minority hiring than from litigating the matter in court or continuing implementation of its current strategies. By negotiating with MLBPA, the owners not only mitigate the possibility of a suit, or at least a successful Title VII suit, but they also benefit in the court of public opinion. Currently, the perception is that MLB lags behind other professional sports associations in minority hiring issues. If MLBPA and its players accept terms to improve minority hiring, critics will find it difficult to question the legitimacy of MLB's efforts. The terms will not be a minimalist attempt to promote diversity, but a long term plan that would be approved by a players' union composed of forty percent minority baseball players.

V. SUGGESTED PROPOSALS TO BE INCLUDED IN THE CBA TO IMPROVE MINORITY HIRING

In many ways this Comment's proposal is contradictory to our notions of corporate management. In essence, this comment proposes that management negotiate hiring guidelines with their employees. Nonetheless, the MLBPA is in a very unique position. MLBPA has the leverage to demand that improvements in minority hiring be implemented. The following are two suggested proposals that the MLBPA could ask for at the bargaining table.

A. Hall of Fame Clause

MLBPA should propose that players meeting a certain statistical and managerial/executive experience threshold be given the opportunity to interview for every manager or GM position. For instance, one variation might be that any player elected into MLB's Hall of Fame with a minimum of five years coaching/executive experience be given the opportunity to interview for any managerial or GM opening. Other variations of this

161. MLB has created the World Baseball Classic (WBC), a tournament of worldwide teams. Isidore, *supra* note 154.

concept would simply scale down the requirements. This proposal would improve minority hiring because it would allow a greater number of minorities an opportunity to interview for these positions. Part II of this Comment pointed out that the best players are frequently minority players.[162] Presumably many of these minority players, along with just as many white players, would be inducted into the Hall of Fame or would have satisfied the minimal statistical requirement.[163] The pool of minority candidates would therefore increase. Moreover, minorities will know that excelling at their sport allows them to overcome the hurdle in becoming a manager. This objective requirement will begin to break down the "old boy network" and give minorities hope that if they wanted to, they could be promoted to managerial and executive positions.

The second requirement, that a player have some minimal number of years coaching experience, does bring the "old boy network" into play again. Minority players will have some difficulties gaining access to these positions, but it should not be as difficult as gaining access to MLB managerial or GM positions. Many teams would be more receptive to having a player, who in many cases is very productive and profitable, be a coach for one of their minor league teams or be a bench coach for their major league team.[164] A MLB team might be more hesitant to provide opportunities for players in entry and lower level executive positions because of the business background that might be involved. However, given the lower stakes of these positions a team would likely be willing to provide an opportunity for minorities. Once a minority player is able to get this experience he will become eligible for managerial consideration.[165]

This proposal has many benefits. First, it is race-neutral. Although it is meant to increase minority hiring, it does not do so at the expense of white players. The proposal simply imposes a system of meritocracy on MLB teams that for years have stated there is a meritorious system when there is not. No proposal can force teams to hire minorities, but as is

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162. *See* discussion *supra* Part II (explaining that in many cases the best baseball players are African American, Latino, and Asian players).

163. Since 2000, six of the thirteen players inducted into MLB Hall of Fame have been minority players. *See* National Baseball Hall of Fame, http://www.baseballhalloffame.org (last visited Sept. 17, 2007) (follow "The Hall of Famers" hyperlink; then follow "Ordered by: Induction Year" hyperlink) (providing a list of all inductees into the MLB Hall of Fame).

164. For example, the New York Mets have six minor league affiliate teams. Four of the six teams are managed by former MLB players. *See* New York Mets: Minor League Affiliates, http://newyork.mets.mlb.com/mlb/minorleagues/team_index.jsp?c_id=nym (last visited Sept. 17, 2007) (providing information on the six minor league affiliate teams).

165. In some ways it is impossible to construct a system that would flout the "old boy network." At its root, the "old boy network" is a problem that is bigger than baseball and falls outside the scope of this comment.

evident in the NFL,[166] if teams are compelled to expand their pool they eventually will see that there are many qualified minority applicants.

Second, this proposal is not over-inclusive. It does not expand the pool of minority applicants so wide that teams must consider any minority candidate. Since 2000, MLB has inducted six minority players into the Hall of Fame. Using this recent trend as a guide, roughly ten to fourteen minority players will be inducted in a decade. Potentially widening the pool to this extent is neither burdensome nor overreaching.

Third, this proposal meets both short-term and long-term goals. There are many former minority players that meet these requirements now, or could meet them with some managerial/executive experience. This would facilitate increased opportunities in the short term, but would also promote a long-term solution because as current minority MLB players meet these criteria they too will enter the pool.

B. Player Hiring Committee Clause

In addition, or in the alternative, to the Hall of Fame clause, MLBPA could ask that MLB teams form player hiring committees when searching for, and choosing managers.[167] The team would allow two to four players to participate in the search and interview process. The players would select who they want to be their representatives. In a team with strong minority representation, it is more likely that the representatives will be a minority. Of course, this would not ensure that minority players would be representatives. The goal is to facilitate opportunities for minorities, not to force minority hiring.

This committee would allow the players to discuss the qualities that they desire in a manager and allow minority players to represent their interests. The addition of player committees would be beneficial in numerous ways. First, it would provide some accountability to MLB owners, especially if minority players are on the committee. MLB owners will be discouraged from quickly dismissing minority candidates and strictly adhering to the "old boy network." Second, players on the committee will recommend candidates that MLB owners never considered. They may suggest minority coaches that they have worked with in the minor leagues or managers that they have heard should be considered. Management would ultimately make the final decision, but the increased

166. The NFL has implemented the Rooney Rule that requires teams to interview minority candidates for head coaching positions. *See* Associated Press, *Lions' Millen fined $200K for not Interviewing Minority Candidates*, SPORTSLINE.COM, July 25, 2003, http://cbs.sportsline.com/nfl/story/6498949 (noting that the NFL is taking proactive steps to discourage discriminatory hiring).

167. This proposal would not affect GM hiring.

player input about the attributes of minority candidates will help break through the "old boy network" and deconstruct cognitive biases that management may have about minority candidates.

VI. CONCLUSION

Title VII litigation is not the solution to improving minority hiring in MLB. Advocates for improved minority opportunities must seek alternative avenues; in particular, non-legal remedies. The doctrines available to a potential minority plaintiff, if one were willing to step forward, will probably not be successful. As this Comment has illustrated, each theory of Title VII presents an almost insurmountable roadblock. As a result, diversity advocates should seek ways to alter the institutions that enable race discrimination. The "old boy network" may be a difficult institution to change, but it is no more difficult than attempting to find a legal remedy. In the present case, MLBPA actually has the requisite strength and clout to improve minority hiring in MLB. The proposed suggestions represent not only potential solutions for MLB specifically, but also suggest, more globally, that it is *employees* that are the key stakeholders in the industry. It is not *only* via the courts that employees must seek remedy.